Fiduciary duties of litigation experts

Fiduciary duties of litigation experts: *Secretariat Consulting Pte Ltd v A Company*

A. INTRODUCTION

In *Secretariat Consulting Pte Ltd v A Company*[1] the Court of Appeal faced the novel question of whether a provider of litigation support and expert witness services owed fiduciary duties to its client. This case presented the court with a unique opportunity to set out a cogent roadmap for recognising fiduciary duties in novel, ad hoc circumstances. After a promising start, the court deemed it unnecessary to follow the fiduciary route, and shifted its focus on the parallel contractual no-conflict clause. The Court of Appeal's reluctance to expand on the High Court's fiduciary law analysis is regrettable, especially since it criticised this doctrine as nebulous and fraught with legal baggage.

B. THE FACTS

An undisclosed company ("Company A") was the developer of a large petrochemical plant. It engaged a project manager and a sub-contractor to carry out construction-related works for the plant. The sub-contractor brought arbitration proceedings against Company A, claiming additional costs due to delays and disruptions allegedly caused by the late release of the design drawings by the project manager ("Arbitration 1").[2] Company A hired Secretariat Consulting Pte Ltd ("SCL"), a Singapore-based company, to provide arbitration support and delay expert services in relation to these claims.[3] SCL ran a conflict check across all entities in its corporate group, and confirmed that it was conflict-free. The engagement letter included a confidentiality clause and expressly confirmed that SCL was and would remain free of conflicts of interest throughout its engagement.[4]

A few months later, the project manager also commenced an ICC arbitration against Company A for unpaid fees ("Arbitration 2"), partly relating to the delay at issue in

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[1] *Secretariat Consulting Pte Ltd v A Company* [2021] EWCA Civ 6, [2021] 4 WLR 20 (hereafter "*Secretariat Consulting CA*"), affirming *A Company v X* [2020] EWHC 809 (TCC), [2020] BLR 433 (hereafter "*Secretariat Consulting HC*").

[2] *Secretariat Consulting HC* at para 6.

[3] *Ibid* at para 8. Delay experts and quantum experts are construction professionals with expertise in project planning and scheduling. They assist their clients and the court in a wide range of technical matters, including collating and analysing the information relevant to identifying which project milestones were not achieved by the contractual deadlines and providing an estimate of the resulting losses (*Secretariat Consulting CA* at paras 57, 86 and 112). The two roles are closely connected (paras 85, 86 and 121).

[4] *Secretariat Consulting HC* at para 11.

Arbitration 1. Company A counterclaimed for the costs caused by the project manager's failure to supervise the sub-contractor and to deliver the design drawings in time.[5] The project manager later retained Secretariat International UK Ltd ("SIUL"), a UK-based company, to provide arbitration support and quantum expert services.[6] SCL and SIUL were both part of the Secretariat Group, an international organisation providing a wide range of litigation support, and delay and quantum expert services in construction arbitrations. SIUL ran a conflict check across the entire Secretariat group, which revealed SCL's prior engagement. When notified, SCL advised Company A that SIUL's engagement "would not constitute a 'strict' legal conflict".[7] Company A expressly disagreed and objected.[8] Nevertheless, SIUL was retained by the project manager in Arbitration 2, while SCL continued its engagement for Company A in Arbitration 1.

Company A filed with the High Court (the Technology and Construction Court) an urgent *ex parte* application for interim injunction against SCL, SIUL and another entity in the Secretariat Group. The court granted interim relief, restraining the defendants from acting as experts for the project manager. Upon the return date, Company A filed an application for the continuation of the injunction. The main claim was that SCL owed Company A fiduciary and contractual duties to avoid conflicts of interest, which prevented SIUL, as a connected entity, from providing similar services against Company A in a related arbitration.

C. THE COURT DECISIONS

At first instance, O'Farrell J held that there was "a clear relationship of trust and confidence"[9] between Company A and SCL, which gave rise to a fiduciary duty of loyalty. One of the determining factors for finding the fiduciary duty was SCL's broad authority to exercise discretion over Company A's interests. The company was engaged not only to provide a delay expert report, but also to "provide extensive advice and support for the claimant throughout the arbitration proceedings".[10] Therefore, SCL was not allowed to place itself in a position where it owed potentially conflicting fiduciary duties to two principals.[11] This

[5] *Ibid* at para 13.
[6] *Ibid* at para 14.
[7] *Ibid* at para 14.
[8] *Ibid* at paras 21-23.
[9] *Ibid* at para 54.
[10] *Ibid* at para 54.
[11] *Ibid* at paras 40-42, citing *Bristol & West Building Society v Mothew* [1998] Ch 1 (CA) at 18 per Millett LJ, and *Prince Jefri Bolkiah v KPMG* [1999] 2 AC 222 (HL) at 234H per Lord Millett.

fiduciary duty of undivided loyalty extended to the entire Secretariat group (thus binding SIUL) for the following main reasons: the entities in the group had common ownership and financial interests, they were marketed as a single global firm and had a common approach to the identification and management of conflicts.[12] The judge went on to find that the Secretariat entities were in breach of the fiduciary duty of undivided loyalty. SCL and SIUL had placed themselves in a position of conflict of interest by undertaking to advise and assist clients with opposing interests in arbitrations which concerned the same underlying matters.[13] Consequently, O'Farrell J continued the injunction, which prevented SIUL from doing any further work in Arbitration 2.

SCL and SIUL appealed. The Court of Appeal dismissed the appeal and upheld the trial decision unanimously, albeit on different grounds. Coulson LJ provided the leading judgment, with concurring opinions from Males and Carr LJJ. The key issues on appeal were whether SCL owed Company A a fiduciary duty to avoid conflicts of interest, whether a conflict of interest arose as a result of SCL's and SIUL's engagement in Arbitration 1 and Arbitration 2 respectively, and whether the no-conflict duty extended to the Secretariat group as a whole.[14]

On the fiduciary duty matter, the court made a number of general observations but did not decide the point conclusively. After canvassing several potential relevant precedents,[15] Coulson LJ concluded that there was no guiding English precedent on the issue of whether an expert organisation owed a fiduciary duty of undivided loyalty, preventing it from advising and giving evidence for and against the same client on closely related matters.[16] At any rate, the existence of such a fiduciary duty would not be prevented, as the appellants argued, by the expert's overriding duty to the court. Echoing O'Farrell J's reasoning, Coulson LJ observed that a fiduciary duty and a duty to the court were not only compatible but also closely intertwined: an expert's obligation to give a true report before the court reinforced her duty to exercise unbiased and accurate professional judgment for the benefit of her client.[17]

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[12] *Secretariat Consulting HC* at paras 57-59.
[13] *Ibid* at paras 60-61.
[14] *Secretariat Consulting CA* at para 31.
[15] These include *Marks and Spencer Group PLC v Freshfields* [2004] EWCA Civ 741; [2005] PNLR 4; *Akai Holdings Limited v RSM Robson Rhodes LLP* [2007] EWHC 1641 (Ch); *Georgian American Alloys Inc v White & Case LLP* [2014] EWHC 94 (Comm); [2014] 1 CLC 86; *Rowley v Dunlop* [2014] EWHC 1995 (Ch).
[16] *Secretariat Consulting CA* at para 34.
[17] *Ibid* at paras 61-63.

After acknowledging that fiduciary duties are not restricted to settled categories,[18] Coulson LJ noted that the relationship between expert witness and client, while not a settled fiduciary relationship, may have one of its core characteristics, namely "a duty of loyalty or, to put it another way, a duty to avoid conflicts of interest".[19]

Regrettably, Coulson LJ did not consider it necessary or appropriate to continue his engagement with the fiduciary law theory,[20] which he discarded as an unnecessary "academic distraction",[21] fraught with "a good deal of legal baggage"[22] and "unseen ramifications".[23] Instead of following the "nebulous"[24] fiduciary route, he based his decision on the express terms of the retainer between SCL and Company A. Coulson LJ held that the no-conflict clause in SCL's engagement letter created an enforceable contractual undertaking to remain free of conflicts of interest for the duration of the retainer.[25] The undertaking was binding on the entire Secretariat group, as a matter of contractual construction: the conflict check carried out by SCL prior to engagement extended across the Secretariat group, which marketed itself as a global business operating in various jurisdictions under a single brand.[26]

The next step was to determine whether a conflict of interest had, in fact, arisen. Rather than simply relying on the fact that the two experts belonged to the same group and were engaged by clients with opposing interests in closely related cases, the court considered the conflict question in detail. The defining factor for finding a conflict was the extensive scope for discretion in the services provided by SCL and SIUL.[27] In addition to providing evidence at hearings, both were consulting experts offering wide-ranging support and advice to their clients in Arbitrations 1 and 2, which shared the same underlying critical issue, namely the delay in the design drawings. This and other factors created all-pervasive overlaps,[28] which, in turn, posed a significant risk that the Secretariat experts would find themselves in a position where they could not concomitantly act in the best interests of their

[18] *Ibid* at para 59; see para 40, citing with approval *Sheikh Al Nehayan v Kent* [2018] EWHC 333 (Comm); [2018] 1 CLC 216 at para 157 per Leggatt LJ.
[19] *Secretariat Consulting CA* at para 66.
[20] *Ibid* at para 66.
[21] *Ibid* at para 64. Males LJ agreed, noting that expert witnesses cannot be regarded as owing fiduciary duties to their clients "[s]ave perhaps in circumstances far removed from the present case" (at para 104).
[22] *Ibid* at para 64.
[23] *Ibid* at para 64.
[24] *Ibid* at para 100.
[25] *Ibid* at paras 69 and 72.
[26] *Ibid* at paras 74, 80 and 81.
[27] *Ibid* at paras 82 and 83.
[28] *Ibid* at para 92.

respective clients. However, Coulson LJ noted, finding an objectionable conflict of interest is always a matter of degree: in certain circumstances it is possible for the same expert to act for and against the same client in unrelated projects, without breaching the no-conflict duty.

D. ANALYSIS

Although the analysis of the fiduciary duty issue is rather perfunctory in both decisions, several notable aspects are worth emphasising.

First, Coulson LJ's approach to identifying fiduciary duties outside of the settled categories pointed away from "trust and confidence" as defining fiduciary hallmarks. Without further elaborating on this point, he cited with approval *Al Nehayan v Kent*,[29] where Leggatt LJ commented that trust and confidence could be useful indicators of a fiduciary relationship only insofar as they stemmed from the acceptance by one party of a role requiring the exercise of judgment and discretion over the interests of the party reposing such trust and confidence.[30] This is a crucial observation, that had the potential to alleviate much of the conceptual "baggage" that obscures this area of law. The High Court judgment in *Secretariat Consulting* is a case in point: O'Farrell J commented rather laconically that "a clear relationship of trust and confidence"[31] arose between SCL and Company A, without expressly relating these elements to the extensive scope for exercise of judgment that SCL had acquired.[32] In another recent example, Asplin LJ stated in *Prince Eze v Conway and Another*,[33] that "[t]he real question" in identifying a fiduciary is whether the person "was acting in a capacity which involved the repose of trust and confidence in relation to the specific duties performed".[34] Far from being a simple terminological clarification, this observation invites courts to unpack the entrenched "trust and confidence" mantra[35] and identify the root elements that are uniquely fiduciary.[36]

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[29] [2018] EWHC 333 (Comm), [2018] 1 CLC 216.
[30] *Ibid* at para 165.
[31] *Secretariat Consulting HC* at para 54.
[32] Although this explicit link is missing, the judge commented in the same paragraph that SCL was engaged to provide "extensive advice and support" throughout the proceedings (*ibid*).
[33] [2019] EWCA Civ 88, [2019] 2 WLUK 34.
[34] *Ibid* at para 43; the other justices agreed.
[35] This expression is used in many foundational fiduciary law cases. See e.g. the often-cited definition of Millet LJ in *Bristol and West Building Society v Mothew* [1998] Ch 1, who defined a fiduciary as "someone who has undertaken to act for or on behalf of another in a particular matter in circumstances which give rise to a relationship of trust and confidence".
[36] For further arguments against seeing "trust and confidence" as essential indicators of fiduciary relations see The Hon Justice J Edelman, "The Role of Status in the Law of Obligations" in A Gold and P Miller (eds), *Philosophical Foundations of Fiduciary Law*

Second, the limited fiduciary law analysis offered by the Court of Appeal is, at times, ambiguous or potentially inconsistent. Much of the examination of the conflict of interest issue rested on the scope of the services that the two expert entities undertook for their respective clients. The Secretariat group sought to distinguish between a "testifying expert" and a "consulting expert", arguing that only the latter role was broad enough to create a risk of conflicts of interest.[37] In rejecting this distinction, the court stated that both quantum and delay experts were likely to have scope for exercise of professional judgment and discretion by virtue of their extensive involvement in the case preparation.[38] The wide-ranging scope for support and advice was a key element that exacerbated the risk of conflicts arising.[39] These observations, although relating to the contractual no-conflict clause, are consistent with the emerging understanding of a fiduciary conflict of interest. In a view that is becoming dominant in the fiduciary academic literature, a conflict of interest (which includes the duty-duty conflict between fiduciary duties to two different beneficiaries) entails a duty to exercise judgment or discretion for the benefit of another and an extraneous interest (or duty) that tends to interfere with the proper performance of that judgment duty.[40] This understanding places the existence of discretion and the concern with its proper exercise at the heart of fiduciary relations and duties.[41] A similar rationale can be discerned from the court's discussion of the conflict of interest issue. When defining the fiduciary relationship, however, the court moved away from the elements of judgment and discretion, resorting instead to stating, somewhat circularly, that the relationship between expert and client may have one of the core characteristics of fiduciary relations, namely the duty of loyalty or the no-conflict duty.[42] This statement is inconsistent with Leggatt LJ's comments mentioned above, cited with approval by Coulson LJ, which place judgment and discretion at the core of fiduciary relations. Just as in the case of "trust and confidence", this inconsistency is not a mere "academic distraction". Substantive and terminological logic are essential in preventing

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(Oxford: Oxford University Press, 2014) 21 at 25; M Harding, "Fiduciary Relationships, Fiduciary Law, and Trust" in DG Smith and A Gold (eds), *Research Handbook on Fiduciary Law* (Cheltenham: E. Elgar, 2018) 58 at 75.

[37] *Secretariat Consulting CA* at para 82.

[38] *Ibid* at paras 83 and 85.

[39] *Ibid* at para 83.

[40] L Smith "Fiduciary Relationships: Ensuring the Loyal Exercise of Judgement on Behalf of Another" (2014) 130 LQR 608; R Valsan, "Fiduciary Duties of Credit Brokers: *McWilliam v Norton Finance*" (2016) 21(1) Edin LR 99.

[41] For an in-depth analysis of discretion see A Gold, "Trust and Advice" in PB Miller and M Harding, *Fiduciaries and Trust: Ethics, Politics and Law* (Cambridge: CUP, 2020), 35.

[42] *Secretariat Consulting CA* at para 66.

situations where courts feel that it is safer to abandon a fiduciary line of inquiry for fear of importing unwanted baggage.

Developing a consistent conceptual framework where judicial analysis aligns with the emerging academic consensus on fiduciary fundamentals would have important practical benefits. The steady rise in global firms that offer professional advice and services in various fields (such as legal, audit, finance, or real estate) intensifies the risk of potential fiduciary conflicts of interest. Clarity and consistency from courts on when fiduciary duties arise and what amounts to a fiduciary conflict of interest are essential in guiding these firms in drafting their terms of engagement so as to avoid or manage the risks of conflicts and the ensuing adverse consequences and costs.

The word "fiduciary" used to be referred to as one of the most ill-defined, if not altogether misleading terms of common law.[43] Several decades later, the precise contours of fiduciary law theory are starting to emerge. *Secretariat Consulting* was a perfect opportunity for the Court of Appeal to contribute to this development. It is hoped that a more robust judicial engagement with fiduciary law theory will render future courts more confident in investigating the presence of fiduciary duties in new circumstances, without undue fear of unforeseen ramifications.

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[43] PD Finn, *Fiduciary Obligations* (Sydney: Law Book Co, 1977), 1.